Supreme Court of the United States

October Term, 1912.

No. 172.

ISIDOR STRAUS and another composing the firm of R. H. Macy & Co.
Plaintiffs and Plaintiffs-in-Error,

vs.

AMERICAN PUBLISHERS' ASSOCIATION, *et al.,*
Defendants and Defendants-in-Error.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR

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In error to the Supreme Court of the State of New York.

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Statement.

On Monday, October 19th, 1911, the defendants in error moved to dismiss the writ of error or to affirm the judgment. The Court directed the motion to stand over until the argument on the writ of error.

Counsel for the defendants before making general argument of the case respectfully submit a

POINT.

In reply to the plaintiffs' "Points in opposition to motion to dismiss Writ of Error."

A.

In our brief on the motion we contended (at page 14) that the Court has no jurisdiction to review the decision of the state courts concerning the effect of the copyright act, because the plaintiffs in error claimed no title, right, privilege or immunity under the copyright act. The defendants claimed such a right, privilege or immunity, and the decision was in favor of their claim.

In their Point III the plaintiffs in error say:

> "Even on the defendants' side it is obvious that the decision in this case turned on a federal question, and it is argued by the defendants in error that the right asserted by them under the copyright laws, though a federal question, is not available to the plaintiffs in error in the Supreme Court to sustain jurisdiction, because the federal right which the defendants asserted was decided in their favor.
>
> This is unquestionably correct as a general rule" (p. 26).

The learned counsel suggest that the ruling on the tenth proposed conclusion of law may be an exception to the general rule.

It is enough to say that no reference to this exception is to be found in the assignments of error, and therefore the case is governed by the general rule, and our Point I is sustained by the plaintiffs' admission.

B.

We argued (pp. 16, 17, 18) that the right claimed under the Federal anti-trust act in relation to copyrighted books which is set forth in the assignments of error was never presented to the appellate courts by adequate specification.

This contention is fully sustained by the statement of facts made by the plaintiffs on the motion to dismiss. Counsel, without reference to the record, describe the purpose, the conduct and the result of the appeals. *The Federal anti-trust law is not referred to,* and it is shown that the question which the appellants intended to raise was the very question which the courts considered and decided, namely, whether *"the decision of the Court of Appeals* (177 N. Y., 473) *in respect to the proper construction of the Federal copyright laws should be held to be erroneous."*

We quote from the brief of the plaintiffs in error:

> "Before their appeal (to the Appellate Division) was heard, this Court had decided the case of *Bobbs, Merrill Co.* v. *Straus* (210 U. S., 339), *and indeed it was in hope of this decision that the appeal of the plaintiffs in error to the Appellate Division was taken.* The Appellate Division and the Court of Appeals had denied relief to the plaintiffs in respect to copyrighted books *solely by reason of the construction those courts placed upon the copyright laws, namely,* * * *
>
> *"The plaintiffs not unreasonably supposed that when by its decision in Bobbs, Merrill Co.* v. *Straus this Court had authoritatively determined that the copyright laws of the United States did not authorize such an as-*

tounding result the Appellate Division and the Court of Appeals would be quick to recognize their error, and, while the case was still before them for consideration and open to any judicial action they might determine to be proper, would grant to the plaintiffs the relief for which they prayed in respect to copyrighted books also.

"The Appellate Division, however, by a majority vote, affirmed the interlocutory judgment in these words:

"'Judgment affirmed with costs, on the authority of 177 N. Y., 473.' Justices Ingraham and McLaughlin dissented, stating in their opinion that the *whole foundation of the previous decision* of the Appellate Division (85 App. Div., 460) and of the Court of Appeals (177 N. Y., 473) *in respect to copyrighted books had been completely overthrown by the decision of Bobbs, Merrill* v. *Straus* * * *.

"It is sufficiently obvious that the decision of the Appellate Division as a court was based on the reasonable ground that *as the Court of Appeals also had maintained this erroneous view of the effect of the federal copyright laws,* a proper respect for the decision of the superior tribunal required the Appellate Division to leave it to the Court of Appeals to *change its former opinion.* * * * The Court of Appeals, when the question certified from the Appellate Division was presented to it *and argument made as to the effect of the decision of this Court in the Bobbs-Merrill case upon the previous decision of the Court of Appeals,* refused, by a divided court, *to change its former decision,* declaring in effect that *even if the decision of this Court in the Bobbs-Merrill case*

showed that the views previously expressed by the Court of Appeals (177 N. Y., 473) *were erroneous in respect to the construction of the federal copyright statutes*—and this the Court of Appeals did not admit—still the decision in 177 N. Y., 473, was the law of this case, and the court would not change it. Judge Bartlett, writing for the three dissenters out of the seven judges who composed the court, took the position *that the decision in the Bobbs-Merrill case was wholly irreconcilable with the former decision of the Court of Appeals* (177 N. Y., 473) *in respect to copyrighted books,* and that as the federal laws are paramount on this subject, and the Supreme Court of the United States is the final arbiter of questions arising under those laws, its decision should be respected and applied (193 N. Y., 502). The Court of Appeals, *therefore,* by a divided vote, affirmed the order.'' * * *

Brief of plaintiffs in error, pp. 8, 9, 10. (Italics ours.)

There is not a word in all this of the Federal question set up in the assignments of error.

The statement establishes beyond peradventure our contention that the only question presented to the Court of Appeals was whether under the proper construction of the copyright act the decision ought to be in favor of the right, privilege or immunity specially set up and claimed by the defendants under that act. The opinions show that the question raised by the assignments of error was not considered by the courts. The brief shows that no such question was involved in the grounds on which the appeal was taken and

argued. These facts are decisive of the jurisdiction of this Court.

> "It is not enough that there may be somewhere hidden in the record a question, which, if raised, would be of a Federal nature."
>
> *Dewey* v. *Des Moines*, 173 U. S., 193, 199;
>
> *Hamilton Co.* v. *Massachusetts*, 6 Wall., 632.

C.

In Point I of the brief of plaintiffs in error our argument at pages 16-20 is not answered in detail and no attempt is made to show adequate specification of the assigned errors in the appellate courts.

Five cases are referred to:

In *Dewey* v. *Des Moines*, 173 U. S., 193, the validity of a state assessment was drawn in question on the ground of its being repugnant to the Constitution of the United States.

In *C. B. & Q. Railway* v. *Drainage Commissioners*, 200 U. S., 561, the question was as to the validity of a state statute under the Constitution of the United States.

In *West Chicago Railroad* v. *Chicago*, 201 U. S., 506, an ordinance passed under the authority of a state was claimed to be repugnant to the Constitution of the United States.

In *Harding* v. *Illinois*, 196 U. S., 78, the constitutionality of a state statute was drawn in question.

All these cases fall within the second class of cases provided for in R. S., Section 709:

> "It has been frequently held that in cases coming within this class, less particularity is required in asserting the Federal right than in cases in the third class, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such privilege or immunity. In the latter class the statute requires such right or privilege to be 'specially set up and claimed.' Under the second class it may be said to be the result of the rulings in this Court that if the Federal question appears in the record in the state court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here."
>
> *Harding* v. *Illinois,* 196 U. S., 78, 85.

In *Green Bay & Canal Co.* v. *Patten Paper Co.,* 172 U. S., 58, the Canal Company explicitly claimed as the foundation of its alleged rights acts of Congress and transactions with the United States.

In all these cases less particularity was required in presenting the case to the appellate courts than in the case at bar and in each of them greater particularity was in fact shown.

In all of these cases a Federal question was involved which, if noticed at all, would be decisive of the case. In the case at bar, the plaintiffs asserted that the agreement was unlawful under both the state and the Federal antitrust statute. The Court of Appeals, in construing the complaint on demurrer said that the agreement was unlawful under the state statute, but, because this Court, in *Bement*

v. *Harrow Co.*, declared that patent monopolies limit the effect of anti-trust statutes, the Court of Appeals held that the right of action did not extend to copyrighted books. Plainly two courses were open to the plaintiffs. They might endeavor that at a "future period in the litigation the decision of the Court of Appeals in respect to the proper construction of the copyright law (might) be held to be erroneous." This they did. (Brief of plaintiffs-in-error p. 8.) Six years of active litigation resulted, which can not be continued here because the final decision of the state court was in favor of the privilege claimed by defendants under the copyright act.

The plaintiffs might also have asked the court to apply the Federal anti-monopoly statute, but to do so effectively it was necessary to point out some difference between the statutes—to claim for the Federal statute some force or effect which the state statute did not have. As the combination was declared illegal under one statute, there was no apparent object in also declaring it illegal under another.

The court refused relief as to copyrighted books not because of any defect of the New York statute as compared with other anti-trust statutes, but because reasonable exercise of the copyright monopoly is not restrained by statutes against unlawful monopoly. The leading case of *Bement* v. *Harrow Company* sustained the patent monopoly against the Federal anti-trust act. The plaintiffs denied the asserted resemblance between the patent and the copyright, but they at all times claimed that the state and the Federal anti-trust statutes were for the purpose of this action

equivalent. The court, therefore, was not "bound to go further and inquire whether the second claim asserted by the plaintiffs in avoidance of the defense * * * was well founded." Nor would the admission of the plaintiffs' claim require a contrary judgment, since the plaintiffs treated the statutes as equivalent and if they are equivalent the judgment must be the same.

> "There is nothing to prevent a party from waiving a Federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause."
>
> *Harding* v. *Illinois*, 196 U. S. 78, 88.

D.

In Point II counsel claim that because in *Bement* v. *Harrow Co.* this Court held that the Federal anti-trust act is a good defense in a suit brought on a contract void under the act, therefore it is a ground of action in the case at bar.

> "It is not sufficient to show that the agreement in question may create a monopoly, may be in restraint of trade, or may be opposed to public policy. Agreements of that nature are invalid and unenforceable. The law takes them as it finds them, and as it finds them leaves them; but they are not illegal in the sense of giving a right of action to third persons for injury sustained.
>
> "And upon such principles it seems equally clear that they afford such persons no ground for seeking an injunction against injury threatened."

National Fireproofing Co. v. *Mason Builders Ass'n.,* C. C. A. 169 F. 263.

Counsel argue that plaintiffs did not seek to enforce the Federal anti-trust statute but only to apply it. The distinction seems unimportant in view of the authority cited, which holds that in cases like the present the Federal statute is neither to be enforced, applied nor considered.

Locker v. *Am. Tobacco Co.,* 121 App. Div. 443, 458; 195 N. Y. 565.

And so in *Nat. Fireproofing Co.* v. *Mason Builders' Ass'n, supra,* a case like the one at bar, of which the Federal Court had jurisdiction by reason of diverse citizenship, the Circuit Court of Appeals for the Second Circuit said:

> * * * "A person injured by a violation of the Federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages" (169 F., 263).

The contention at p. 20 of our former brief was not that these decisions are correct, (which is not on this motion important), but that they should be considered in deciding whether the state courts could have reasonably rested their decision upon independent grounds of practice or common law right, which did not involve the Federal question set up in the assignments of error, and some of which involved no Federal question.

The whole discussion has become superfluous if we are right in saying that the brief of plaintiffs

in error shows that counsel did not present or intend to present to the Court of Appeals the Federal question set up in the assignments of error.

Passing from the motion to dismiss we make the following:

STATEMENT OF ARGUMENT AND POINTS ON WRIT OF ERROR.

The five assignments allege in different language the same error, namely: that the court erred in sustaining as against the Federal anti-trust act, the right, privilege or immunity claimed by the defendants under the copyright act.

Manifestly such an error might have arisen either from an erroneous construction of the copyright law or from not giving due weight to a claim of right made by the plaintiffs under the Federal anti-trust act.

As has been pointed out in our brief on the motion to dismiss, the construction of the copyright act was from the beginning to the end of the litigation in the state courts the chief subject of controversy and, so far as the appeal from the judgments was concerned, the sole matter passed upon and decided. The decision as to the effect of the copyright law cannot be re-examined, because it was in favor of the right, privilege and immunity claimed by the defendants under the copyright law; our contention in this regard, made at page 14 of our former brief, is conceded by the plaintiffs in error to be "unquestionably correct as a statement of the general rule." *(Brief of plaintiffs in error on motion to dismiss.* p. 26.) And no question raised by the assignments of

error is pointed out as an exception to the general rule.

The sole question in this Court, therefore, is whether the state court erred in deciding against a claim by the plaintiffs of a right, privilege or immunity under the Sherman Act. We have pointed out that the state appellate courts did not, in fact, consider such a claim, as appears from the opinions, and that the plaintiffs did not intend to present such a claim, as appears from their brief (*supra*, pp. 3-5). We have argued that no such claim was "specially" made in the trial court or, by adequate specification, presented to the appellate courts, (brief on motion, pp. 15-20) and that there is nothing in the case to excuse the lack of adequate specification (*supra*, pp. 6-9).

If, nevertheless, we assume that the plaintiffs in error made such a claim as is set up in the assignments of error, and further assume that the state courts decided against the claim, such a decision was not erroneous—first, because the state court was not bound to apply the Federal anti-trust statute in this case; second, because the plaintiffs have come into a court of equity with unclean hands and besides are seeking to maintain an action when it is manifest that they have suffered no actionable damage; third, because the Federal act to protect trade against unlawful monopolies clearly does not prohibit reasonable enjoyment of the copyright monopoly, and fourth, because the combination of the defendants was not unlawful under the Federal anti-trust act.

FIRST POINT.

The omission to apply the Federal Anti-Trust Act was not error.

a) because that act is not applicable in such an action as this when brought in a state court;

b) because the act is not applicable in an equity suit brought for an injunction unless the suit is brought by the Attorney General;

c) because the Federal and state anti-monopoly statutes cannot be applied to the same subject matter in the same action; and

d) because the complaint did not state facts sufficient to constitute a cause of action under the Federal anti-trust act or to show that the agreement or combination was in violation of that act.

A.

In an action sounding in tort brought in a state court and which does not solely relate to interstate commerce, the court is not bound to apply the Federal anti-trust act.

This act declares certain contracts illegal, and any one sued upon a contract may set up as a defense, that the contract is a violation of an act of Congress.

Bement v. *Nat. Harrow Co.,* 186 U. S., 70.

But the defendants are not seeking to recover upon a contract.

The act also gives certain remedies in the United State Circuit Court to persons injured.

"It thus appears that the act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. It is not a criminal proceeding (Sections 1, 2, 3) nor a suit in equity in the name of the United States to restrain violations of the Anti-Trust Act (Sec. 4), nor a proceeding in the name of the United States for the forfeiture of property being in the course of transportation (Sec. 6), nor an action by any person or corporation for the recovery of threefold damages for injury done to business or property by some other person or corporation" (Sections 7-8).

Minnesota v. *Northern Securities Co.*, 194 U. S., 48, 68.

By Section 7 of the Sherman Act a person injured in his business or property may sue therefor "in any Circuit Court of the United States in the district in which the defendant resides or is found." And see Section 4.

Jurisdiction is given to the specified Federal courts and to no other court, the statute differing in this respect from those examined in

Second Employers Liability Cases, 223 U. S., 1, 56.

The New York courts had, therefore, no jurisdiction to give relief on the ground that the defendants violated the Sherman Act.

In *Bement* v. *National Harrow Co.*, 186 U. S. p. 87, it was assumed that a person injured in his person or property by acts violative of the Sherman Act, must sue in a Circuit Court of the United

States, in the district in which the defendant resides or is found; and it would seem to follow that a state court has no jurisdiction under the act.

Agreements creating a monopoly in restraint of trade and against public policy, though invalid and unenforcible, are not illegal in the sense of giving a right of action to third persons for an injury sustained, nor as affording ground for an injunction against threatened injury.

This was held in a suit closely resembling the suit at bar in which the United States Circuit Court for the Southern District of New York had jurisdiction by reason of diverse citizenship.

> *National Fireproofing Co.* v. *Mason Building Association,* C. C. A., 169 F., 259.

Whether such a suit shall be sustained under the common law and the general law of New York, such as the suit at bar, (*Brief of plaintiffs in error on motion to dismiss,* pp. 21, 22) was a question for the New York courts to decide.

> *Penn. R. R. Co.* vs. *Hughes,* 191 U. S. 477.

The law of New York relating to these actions is as follows:

> "We may eliminate from consideration the statutes of the United States, referred to in the complaint, because they have no bearing upon the cause of action here presented. They relate only to matters in restraint of trade or commerce between or among the several States of the Union or with foreign nations, and for a violation of their provisions redress must be sought in the Federal courts, which alone have jurisdiction. The common

law, and the particular statute claimed to have been violated by the defendants, viz., chap. 690 of the Laws of 1899, commonly known as the Donnelly Act, control the determination of the question whether the acts alleged support the contention that they are illegal and in restraint of trade.''

Locker v. *American Tobacco Co.,* 121 App. Div. 443, 449—aff'd on opinion below, 195 N. Y. 565.

State of Missouri v. *Associated Press*, 51 L. R. A. 170.

No case has been found in which a state court has allowed a recovery based upon the Sherman Act or on account of its violation.

In Point I of their principal brief counsel for the plaintiffs in error cite to sustain the jurisdiction of this court only one authority—the case of *Straus* v. *American Publishers Association* in the Court of Appeals for the Second Circuit.

When Macy & Company filed their writ of error in this court they also prosecuted in the United States Circuit Court a suit against the same defendants to recover under the Sherman Act threefold damages for the same alleged trespass set up in the suit at bar. In the defendants' answer in the Circuit Court the judgment of the state court in the suit at bar was set up by way of *res judicata;* to this Macy & Company replied

> ''that the judgment in the State Court was not *res judicata* * * * because the present action was founded on the Federal statute *under which the State Court had no jurisdiction* * * *''

(Brief of plaintiff in error, p. 33.)

This view was taken by the Court, which said, speaking by Judge Ward,

> "The fact that the judgment in the State Court depended upon the state statutes and that the complaint in this case is founded on the Federal statute *which is not within the jurisdiction of the State Court* makes no difference" (ibid p. 35).

Macy & Company having successfully asserted in the Circuit Court of Appeals that the state court in the suit at bar had *no* jurisdiction under the Sherman Act, now adduce this fact as persuasive that the state court had such jurisdiction! We submit that the decision of the Circuit Court of Appeals in *Straus* v. *American Publishers' Association* aids our contention, not only as an authority exactly in point, but also on the principles which underlie the law of estoppel and those which underlie the law of the thing adjudged.

B.

In a suit for an injunction not brought by the Attorney-General, there can be no recovery on the ground that a combination is illegal under the Federal anti-trust act.

It was so held when the Federal court had jurisdiction by reason of diverse citizenship.

> "A person injured by a violation of the Federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages."

Nat. Fireproofing Co. v. *Mason Builders' Ass'n* (C. C. A.), 169 F., 259, 263;

Pidcock v. *Harrington*, 64 F., 821;
Greer, Mills & Co., v. *Stoller*, 77 F. 1,

and cases cited in our former brief pp. 20, 21.

C.

It was not error to refuse to apply the Sherman Act in a suit brought under the New York anti-trust act, in which an injunction had been granted.

If it be assumed that the American Publishers' Association was illegal under both the New York anti-trust statute and the Federal anti-trust statute and that the plaintiffs had a right to bring a suit in equity in the New York courts to enjoin the defendants because their agreement violated the Federal act, nevertheless the plaintiffs could not, with a complaint containing only one cause of action, assert their rights under both statutes, because these relate to different subject matter.

If we assume that the agreement violated both laws, the plaintiff might proceed under either and recover all the damages which he had sustained, but he was forced to elect.

Straus v. *Am. Publishing Ass'n*, C. C. A. brief of plaintiffs in Error, p. 35.

The Federal act could have no application to a monopoly in manufacture, production or sale within the State of New York of an article or commodity of common use or to the restraint of competition in the State of New York in the supply or price of such articles or to a restriction upon the free pursuit in the State of New York of the lawful business of selling books at retail.

U. S. v. *Knight Co.*, 156 U. S., 1.

It was to these matters, wholly within the boundaries and the jurisdiction of New York that the agreement and combination were adjudged to relate. (Record, p. 138). The New York statute, on the other hand, is superseded so far as it covers the same field with the Federal act.

> *Second Employers Liability Cases*, 223 U. S., 1, 55.

If the combination related to interstate commerce there was no cause of action for violation of the state law; if it related to intrastate commerce (as was adjudged) there was no cause of action for violation of the Federal law.

If the plaintiffs, alleging restraint of interstate commerce, had sought to give effect to the Sherman Act, they might have raised the question whether state courts, unlike the Federal courts, must, in a suit not brought by the Attorney-General, grant injunctions against combinations which violate the Sherman Act. But when, alleging acts within the State of New York restricting the free pursuit within that state of the lawful business of selling books at retail, plaintiffs sought to give effect at once to a statute which solely relates to interstate commerce and a statute which solely relates to commerce within the State of New York, they raised, at most, a question of practice, and the court under the inherent right to protect itself against confusion and incoherence, could say

"Whatever your rights under the Sherman Act may be, you cannot assert them in this action concurrently with rights under the Donnelly Act, which we are enforcing because you allege and

prove that the subject matter of your suit falls within the exclusive jurisdiction of the State of New York."

D.

The complaint contained no sufficient allegation of facts showing that the combination restrained interstate commerce, and therefore an omission to give effect to the Sherman Act was not erroneous.

It was alleged that the members of the Publishers' Association did business in different states. There is no sufficient allegation that the plaintiffs or any of the defendants were engaged in interstate commerce.

The allegation in the complaint relied on is as follows:

> "*Nineteenth.*—That thereafter, and ever since May 1st, 1901, the defendants have unlawfully, and contrary to the declared policy of this State and its statutes, maintained such combination whereby competition in this State, *as well as throughout all the States of the United States,* in the supply and price of books, has been and is restrained or prevented, and whereby the free pursuit in this State of the lawful business of selling books has been and is restricted or prevented to the great injury and damage of these plaintiffs."

Record, p. 25.

The plaintiffs in error rely upon the words which we have italicized, but obviously, the whole nineteenth paragraph was framed to bring the case within the Donnelly Act and the italicized words are surplusage.

Troxell v. *D., L. & W. R. Co.*, 185 F., 540. 541.

Counsel in their brief on the motion to dismiss, say, at page 7

> "Any lack of specification in the complaint is fully cured by the findings of fact of the Trial Court and the propositions of law based thereon, presented by the plaintiffs in error and decided adversely to them, both by the trial courts and by the appellate courts."

And at page 42 of the principal brief they make an assertion to like effect.

But findings of fact did not cure the defects in pleading, because a plaintiff can only recover *secundum allegata et probata.* The trial judge was not bound to hold that the agreement restrained interstate commerce under the Federal anti-trust act because that was not duly alleged. If, under the liberal power of amendment given by the New York Code of Civil Procedure, he might have amended the complaint so as to set up a claim under the Federal act, he was not bound to do so unless the plaintiffs moved for such amendment. No amendment was made and none was asked for. After judgment there was no power in any court to amend a pleading for the purpose of upsetting the decision and reversing the judgment. These familiar rules are enforced in the New York practice.

Brightson v. Claflin Co., 180 N. Y., 76, 81;

Northan v. *Dutchess Co. Mut. Ins. Co.*, 177 N. Y. 74;

> *Truesdell* v. *Sarles,* 104 N. Y. 167;
> *Pope* v. *Terre Haute Car & Mfg. Co.,* 107 N. Y., 61, 66.
> *Southwick* v. *First Natl. Bank of Memphis,* 84 N. Y. 420;
> *Freeman* v. *Grant,* 132 N. Y. 22, 29;
> *Reed* v. *McConnell,* 133 N. Y. 425, 434;
> *Bradt* v. *Krank,* 164 N. Y. 515, 519.

The decision therefore rests upon grounds of state procedure, with which it is not the province of this Court to interfere.

> *Western Union Tel. Co.* v. *Wilson,* 213 U. S. 52, 54;
> *Kipley* v. *Illinois,* 170 U. S. 182, 187, 188, 189;
> *Layton* v. *Missouri,* 187 U. S. 356;
> *Allen* v. *Alleghany Co.,* 196 U. S. 458, 465, 466;
> *Tripp* v. *Santa Rosa Street Railroad Co.,* 144 U. S. 126.

SECOND POINT.

It was not error to dismiss the complaint as to copyrighted books because (a) The plaintiffs have not come into a court of equity with clean hands, and (b) It appears that the plaintiffs have suffered no actionable damage from the acts complained of.

A.

The plaintiff does not come into the court of equity with clean hands.

> "A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any unconscionable act in the transaction which forms the basis of his suit."

Mich. Pipe Co. v. *Fremont Ditch Pipe Line & R. Co.,* C. C. A. 111 F. 284, 287.
1 *Pomeroy Equity Jurisprudence,* Sec. 404, 398.
Medicine Co. v. *Wood,* 108 U. S. 218, 227.
Comstock v. *Johnson,* 46 N. Y. 615.
Fetridge v. *Wells,* 4 Abb. Pr. 144.
Toledo Computing Scale Co. v. *Computing Scale Co.,* C. C. A. 142 F. 919.

This suit arises from the defendants' refusal to supply their copyrighted books to Macy & Company. It is not pretended that any defendant as an individual was bound by contract or otherwise to sell to Macy & Company. Their alleged rights rest solely upon the combination of the defendants. That combination was formed and continued, so far as Macy & Company were concerned, solely by reason of their course of dealing with the defendants' copyrighted books within the first year after publication. But for that course of dealing, the combination would never have affected Macy & Company. If that course of dealing ended the combination ceased to affect them.

Record, Findings 43-47, 33, pp. 124, 122.

Macy's course of dealing with the publishers' copyrighted books was the origin and basis of the controversy. It follows that if that course of dealing—the use made by Macy & Company of the defendants' copyrighted books within the first year after publication—was wanting in good faith, honesty or righteous dealing, if it was unconscionable, the maxim applies and the plaintiffs cannot maintain this suit in equity. Without repeating what is said elsewhere, it may be here pointed out that the use made by Macy & Company of new copyrighted books was monopolistic, injurious to the publishers and the booksellers and fraudulent as regards the public.

(a) The practice of Macy & Company is monopolistic.

They claim to sell all articles "at a lower figure than the same article can be obtained any-

where else'' and books in particular ''at a cheaper price than at other retail book stores.'' (Record, pp. 15, 134.) As only one dealer can sell cheaper than all other dealers, this is equivalent to saying that they occupy the position sought by the monopolist of having overcome competition.

In effect it is asserted that Macy & Company have attempted to monopolize and have monopolized a part of trade or commerce.

To prove their assertion they sell current magazines and new copyrighted books cheaper than any other dealer and, if necessary to meet competition, at less than the wholesale price at which they purchase (p. 134). That is to say, they use their

> ''power to crush existing and threatened competition by so slaughtering prices for a time as to ruin all who are not parties to the combination.''
>
> *1 Eddy on Combinations*, Sec. 329.

This shows

> ''an attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business,''

which is a ''badge of monopoly.''

> *Message of the President to Congress*, Dec. 5, 1911.

(b) Such dealings even by a producer selling goods of his own manufacture may be ''a badge of monopoly,'' but Macy & Company dealt, not with books of their own manufacture, but with books manufactured by the defendants, and the

result not only tended to monopoly, but was injurious both to the publishers and their customers, the booksellers.

This appears from the record, (*Finding* 92, p. 133) from the unanimous desire of publishers and dealers to establish a fixed price system and from the allegations of the complaint (*Twelfth* to *Fourteenth, Sixteenth, Twenty-third,* pp. 16, 17, 21), and it appears from all the facts found relating to the trade of Macy & Company. A bookseller cannot compete in the sale of magazines or new copyrighted books with a dealer who sells them at less than cost. The publisher loses by the narrowing of his market, by the difficulty of selling to the trade books which Macy & Company advertise at prices with which dealers cannot compete and by the injury to his own retail business.

As was said by Judge Edward T. Bartlett in this case:

> "The result is a large number of the retail dealers in the various kinds of articles thus undersold are driven out of business, many of them at a time of life when they are unable to reinstate themselves in some other calling.
>
> It also results in great damage to manufacturers, producers and wholesale dealers who have been driven into insolvency.
>
> It is, of course, true that the proprietors of department stores have the legal right to offer to the public goods of any kind at prices below production, or indeed, may donate them to their customers.
>
> It is, however, equally true that the manufacturers, producers and wholesale dealers may say to the men whose policy is thus carrying ruin and destruction to their business

> and that of their customers, that if you persist in this disastrous cutting of rates we will sever all business connections absolutely. These are mutual and inherent rights, in the nature of things, so long as self-defense and the privilege to exist survive among men."
>
> *Straus* v. *Am. Pub. Assn.*, 177 N. Y., 473.

This dissenting opinion was rendered upon demurrer to the complaint when the facts as to the plaintiffs' dealings had not yet been proved, and these dealings were not considered in the opinion of Parker, *C. J.* If the defendants had appealed from the final judgment as to uncopyrighted books they might well have succeeded on this ground, and they can now rely upon it for affirmance as to copyrighted books under the rule laid down in the opinion of the court in *Park Sons Co.* v. *National Druggists' Assn.*

> "I am not here going to question the right of the big fish to eat up the little fish, the big storekeeper to undersell and drive out of business the little storekeeper, but I do believe that the little fellows have the right to protect their lives and their business, and if they can by force of argument and persuasion induce manufacturers to establish a uniform price for fixed quantities, so that they can purchase as cheaply as the great merchants, and thus compete with them in the retail trade, they have the right to do so, and that no court of equity ought to interfere and restrain them from the exercise of this privilege."
>
> *Park & Sons Co.* v. *Nat. Druggists' Assn.*, 175 N. Y., 1, 14.

This is the rule of law laid down by the New York Court of Appeals and therefore controlling in this suit brought in a New York court.

(c) The dealings of Macy & Company with copyrighted books were also a fraud on the public.

All the copies of an edition of a newly published copyrighted book are equivalent, and so are all the copies of a current magazine.

A copy bought at Macy's is just as desirable and valuable as a copy bought elsewhere. Hence, if Macy & Co. undersell all competitors in magazines of the current month, and new copyrighted books, they establish beyond cavil a standard of cheapness. To accomplish this they advertise and sell these articles at lower prices than others receive, and they make such sales even if the dealings are wholly unprofitable. These bargains are not of remnants or shop-worn or unseasonable articles or goods which for any reason have been marked down in price, but they are in new goods bought from month to month or day to day for the express purpose of being sold at less than cost. This practice, so foreign to ordinary commercial usage, continues because "Books are merely a peg on which to hang a general story" —the false story that other articles are sold more cheaply than books.

This false story is told in many forms. This is one of them:

> "*Read this Everybody.*
>
> Competitors, when continually undersold, indulge in unfair and absurd claims. The readiest subterfuge is an attempt to disparage our qualities. When confronted with the

fact that our prices are lower than theirs, they invariably try to explain the beat by attacking the character of our goods. How about Books? We use them to illustrate because you *know* books. They silence criticism. Our rates range from 10 cents to $1.50 less than others ask for the same books. We save you much more on other lines."

Record, p. 135.

Before these facts came into the case Judge Edward I. Bartlett wrote:

> "As an illustration, a dry goods establishment, engaged in selling a vast number of articles legitimately related to its business, concludes, in order to promote its principal trade, to offer for sale books, furniture, druggists' sundries and numerous other articles that need not be mentioned, at cut prices, representing only the cost of production and oftentimes far below it. The inevitable effect of this policy is to draw a large number of people to these establishments, and in the final result the dealer makes good his losses in the outside trade by the prices he obtains in his legitimate business.
>
> It may be fairly assumed that the general business is conducted at a profit."

177 N. Y., 493.

The purpose of this action is to compel the publishers to allow their new copyrighted books to be sold by Macy & Co. to the public at less than cost as a basis for advertising as follows:

> "on other lines—the ones more difficult for inexperienced persons to judge of qualities—

the price differences in our favor are much greater."

Record, p. 134.

In trade mark cases it is held that

"the plaintiff should not in his trade mark, or in his advertisements or business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect he loses the right to claim the assistance of a court of equity."

Worden v. *California Fig Syrup Co.,* 187 U. S., 516, 528, 530.

"Those who come into a court of equity seeking equity must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must be free themselves from the imputation.

If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished" (Duer, *J.*).

Fetridge v. *Wells,* 13 How. Pr., 388.

It is set up as a defense that the plaintiffs cannot maintain this action in equity (p. 36), but the defense is available even if not pleaded.

Uri v. *Hirsch,* 123 F., 568, 578.

B.

The plaintiffs were not damaged by the defendants' acts.

The damage is the cause of action and the combination mere matter of aggravation.

Verplanck v. *Van Buren*, 76 N. Y., 247, 259, 260.

"Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."

Central Coal & Coke Co. v. *Hartman, C. C. A.*, 111 F., 96.

There must be pecuniary loss.

The Conqueror, 166 U. S., 110.

"By consequences which the plaintiff, acting as prudent men generally do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendants' wrong, since it is at the plaintiff's option to suffer them."

Sedgwick on Damages, Sec. 202.

The controversy between Macy & Co. and the publishers was whether the plaintiffs should make an ordinary profit or a profit smaller than is usual in the trade. The defendants wished the plaintiffs to make a profit by selling at the market price. The plaintiffs preferred to make a smaller profit, or a loss, by selling at a lower price than any other dealer.

Macy & Co. could at all times have purchased the defendants' copyrighted books on the most

favorable terms to sell at market prices. *Finding* 33, *Record,* p. 122, 45, 46, 47, p. 124.

By so doing they would have increased their profits. To obtain books from the defendants they were not obliged to make any unlawful agreement or to join any association; indeed, they were not eligible to membership in the American Publishers' Association. The only condition imposed was that in selling defendants' copyrighted books they should for one year after publication make a larger profit than they were accustomed to make, being the profit universally made by retail dealers. The acts of the defendants did not, therefore, cause pecuniary loss to the plaintiffs, and, if wrongful, at most constituted *injuria sine damno.*

If the plaintiffs sustained loss it was a consequence of their own wilful act. This more fully appears from the specific findings made by the Court to show the nature of plaintiffs' dealings in copyrighted books. The plaintiffs, for twenty-two years, sold the defendants' magazines so much below the market price that the actual loss, in addition to expenses of sale, was three cents on each copy. Record, p. 134.

Obviously the plaintiffs suffered no legal damage from the interruption of this business, but, on the contrary, received pecuniary advantage.

> *Authors & Newspaper Assn.* v. *O'Gorman Co.,* 147 *F.,* 616, 621.

So the plaintiffs to meet competition sold new copyrighted books at retail at less than the wholesale price which they paid therefor. Record, p.

134. Obviously the plaintiffs were pecuniarily benefitted by the prevention of such dealings.

The typical transaction and the one which caused the defendants to refuse to make further sales to the plaintiffs is shown in Findings 43-47, at page 124. The copyrighted book "*Tarry Thou Till I Come*" was published by the Funk & Wagnals Company to be sold at retail at the net price of $1.40. The plaintiffs sold it at $1.24, and refused a request to sell it at $1.40. It is not suggested that they would have met with any difficulty in selling at the net price. They preferred to sell at a price lower than the market price which they could obtain as all other dealers did. They refused to take the books unless they could sell at 16 cents per volume less than the market price. The purpose and the natural effect of the defendants' act was to increase the plaintiffs' profit. The plaintiffs could suffer loss only by wilful refusal to deal with the defendants on the terms offered by them. Even if the defendants' act was wrongful the plaintiffs thereby suffered no pecuniary damage.

There is no allegation or proof of special damage and by the general rules of law a refusal to sell goods except upon terms which increase the vendee's profit is not actionable. A plaintiff cannot recover for losses prevented or gains increased. Courts give no remedies for self-imposed injuries. The suitor to whom compensation is awarded for injury to business is the normal man, who trades to make profit and avoid loss; who sells for the best price obtainable; who conducts his business according to the rules which

commonly prevail among prudent people. A man cannot recover in tort for injury resulting from "his abnormal and peculiar mode of doing his business."

1 Sedgwick on Damages, Sec. 143.

Even if the defendants had broken a contract to furnish the books, the plaintiffs could not recover damages caused by their refusal to accept the goods when offered on reasonable conditions —and conditions willingly observed by the whole trade are presumptively reasonable.

Warren v. *Stoddart,* 105 U. S., 224;
Parsons v. *Sutton,* 66 N. Y., 92;
Lawrence v. *Porter,* 63 F., 62;
Hamilton v. *McPherson,* 28 N. Y., 72, 76, 77;
Rochester Lantern Co. v. *Stiles & Parker Press Co.,* 135 N. Y., 209, 217;
Brown v. *Weir,* 95 App. Div., 78;
Milton v. *Hudson River Steamboat Co.,* 37 N. Y., 210, 214, 215;
Ashley v. *Rocky Mountain Bell Tel. Co.,* 25 Mont., 286;
L. & N. R. Co. v. *Sullivan Timber Co.,* 138 Ala., 379;
Scherrer v. *Baltzer,* 84 Ill. App., 126;
French v. *Vining,* 102 Mass., 132;
Rudell v. *Grand Rapids Cold Storage Co.,* 136 Mich., 528;
Vencell v. *O. & K. C. R. Co.,* 132 Mo. App., 722;
Dobbins v. *Duquid,* 65 Ill., 464.

If, under *Hadley* v. *Baxendale,* a vendee's notice of the use which he intends for the goods binds the vendor, it must equally bind the vendee himself. If a bookseller asks for *"Tarry Thou Till I Come,"* to be offered for sale by him at a certain profit, and the publisher tenders the book on the same terms on which it is offered to all other such dealers, which will give the bookseller a profit on each book greater by sixteen cents, the bookseller suffers no pecuniary injury. He must accept the offer or forego his action against the vendor for damages.

> "Of course he was not obliged to buy that stock, but the opportunity to buy it served to fix and limit the damage he suffered by reason of defendant's refusal to deliver."
>
> *Joseph* v. *Sulzberger,* 136 App. Div., 499, 508.

There is here no claim or suggestion of special damage.

> "The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible, but rather along the lines of the actual and the probable, and therefore the reasonable expectation must be made to appear by the evidence. Conjecture, speculation and fancy cannot supply the absence of evidence or avoid the effect of evidence which is presented."
>
> *Swift & Co.* v *Johnson, C. C. A.,* 138 F., 867, 873.

THIRD POINT.

Notwithstanding the Federal anti-trust act it is lawful for a publisher when selling, at wholesale, books copyrighted by him, to fix, by agreement with the purchasing bookseller, the retail price at which such copyrighted books shall be sold during a period of one year.

The rules of the American Publishers' Association here in question which were in force at the time of filing the answers were as follows:

> "I.—That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new edition, any work of fiction or any juvenile.
>
> "II.—It is recommended that the retail price of a net book, marked NET, be printed on a paper wrapper covering the book.
>
> "III.—That the members of the Association agree that copyrighted books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those

> booksellers and jobbers only who will sell their copyrighted books, except at retail, to no one who cuts such net prices'' (pp. 39, 40, 41, 66, 67, 119).

Rule IV provided that works of fiction might be sold at retail for a discount not exceeding 28 per cent. from the fixed price. This is a mere modification of the net price rule and does not require separate discussion.

Without doubt a patentee may, when selling his patented article, impose by agreement with the vendee a restriction as to the price at which the article may be thereafter sold.

> ''Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions, which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. * * *
>
> ''But that statute [the Sherman Act] clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * *
>
> ''The owner of a patented article can, of

course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.''

Bement v. *Nat. Harrow Co.*, 186 *U. S.*, 70, 91, 92, 93.

See also:

Henry v. *Dick Co.*, 224 *U. S.*, 1, 31, 39, 43, 44, 45, 46, 47.

Victor Talking Mach. Co. v. *The Fair*, 123 *F.*, 424, 61 *C. C. A.*, 58;

Nat. Phonograph Co. v. *Schlegel*, 128 *F.*, 733, 735, *C. C. A.;*

Robinson on Patents, Sec. 824;

Edison Phonograph Co. v. *Kaufmann*, 105 *F.*, 960;

Park & Sons v. *Hartmann, C. C. A.*, 153 *F.*, 24;

Edison Phonograph Co. v. *Pike*, 116 *F.*, 863;

and cases cited at page 38, 224 United States Reports.

The rule applies also in copyright cases.

In the case at bar Chief Judge Parker, speaking for the New York Court of Appeals, quoted the sentence first above copied from *Bement* v. *National Harrow Co.*, and continued:

> ''That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the Association and agreement attached in this action'' (*Straus* v. *Am. Pub.*

> *Asso.*, 177 N. Y., 473, 477; opinion of Gray, *J.*, 488, 489; opinion of Gray, *J.*, speaking for the court on the second appeal; *Record*, p. 184).

Patents and copyrights exist under the constitutional provision which empowers Congress

> "To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."
>
> *Constitution*, Art. 1, Sec. 8, Sub. 8.

Congress, by Title LX. of the Revised Statutes, (in force when the judgment herein was entered) protected these allied rights by similar statutes, which, in regard to the point now in question, employ almost the same words.

A patent gives the "exclusive right to make, use and vend the invention." (Section 4884.) A copyright gives the "sole liberty of printing, * * * publishing * * * and vending" the copyrighted article. (Section 4952.)

The monopoly of making and vending the patented article and the monopoly of printing and vending the copyrighted article are given in equivalent language and by ordinary rules of interpretation are equivalent.

It is only in the "field of use" that the monoolies differ. The patentee has the exclusive right to * * * use * * * the invention.

The copyright owner has the

> "sole liberty of * * * publishing, completing, copying, executing, finishing * * * the book, map, chart, etc., and in the case of a dramatic composition, of publicly performing it or

causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their books for which copyright shall have been obtained under the laws of the United States.''

R. S., Sec. 4952.

''Each and all of these statutory rights should be given such protection as the act of Congress requires, in order to secure the rights conferred upon authors and others entitled to the benefit of the act.''

Bobbs-Merrill Co. v. *Straus*, 210 U. S., 339, 348.

The patent law gives a complete monopoly and the copyright law a partial monopoly of the ''field of use.'' A reason for this distinction is that copyright is given only on condition that there is publication of the copyrighted article. Publication gives to the public a right to make certain uses of the book and the monopoly in the ''field of use'' conferred by the copyright can, at most, extend to what is left after the rights of the public gained by publication are protected.

''Restrictions imposed upon the use prior to publication protect the copyright. Such restrictions imposed after publication cannot affect the public rights acquired by publication. * * * The same distinctions are observed and the same rules applied in the cases where statutory copyright has been obtained.''

Werckmeister v. *Am. Lith. Co., C. C. A.*, 134 *F.*, 321.

Publication of a book implies the distribution of copies. The owner of a copy has the unrestricted right to read it, sell it, bind and rebind it (*Kipling* v. *Putnam*, 120 *Fed. Rep.*, 634, *C. C. A.*) and also a right to make use of its contents for purposes of criticism, quotation and the preparation of other works; this latter right not being unlimited, but restricted and defined by the decisions of the courts concerning the "fair use" of copyrighted books.

"The sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending," is in short the sole right to multiply and vend.

Henry v. *Dick Co.*, 224 U. S., 1, 46.

The right to dramatize a work, or publicly to perform a play or musical composition is a right to use. The right to translate, to make extracts, to copy for purposes of criticism or in the preparation of another work is in a sense a right to multiply copies, but it may also be considered a right to use.

The word "use" is frequently employed in the act in force July 1, 1909,

Copyright Law, §§1 (e), 2, 6, 7, 25 (e), 31 (proviso).

Most copyright litigation relates to the field of use.

"In the law of copyright, piracy is the use of literary property in violation of the rights of the owner. The meaning of infringement is the same."

Drone on Copyright, 383.

Certain uses of the copyrighted book are held to be lawful. All other use is within the exclusive control of the owner of the copyright.

The line between "fair" and "unfair" use—the use permitted by the act of publication, and the use reserved in spite of publication—has been drawn in many cases in connection with different subjects, such as Criticism, Quotation, History, Biography, Abridgments, Translation, Dramatization, Treatises, Directories, Dictionaries, Catalogues.

Drone on Copyright, 387-399, 433, 467.

The cases show that in the field of use, as in the broader field of use under the patent law, the owner of a copyright may farm out such part as he pleases and may retain the remainder, and contracts making such division are lawful.

> "The same rule should be applied to a copyright as to a patent for a machine."

Story v. *Holcombe*, 4 McLean, 306;

The courts have followed the patent cases whenever applicable.

Macgillivray on Copyright, 281, 282;
Callaghan v. *Myers*, 128 U. S., 617;
Reed v. *Holliday*, 19 Fed. Rep., 325;
List Pub. Co. v. *Keller*, 30 Fed., 772;
Gilmore v. *Anderson*, 38 Fed., 846;
Harper Bros. v. *Donohue*, 144 Fed., 491, 492;
West Pub. Co. v. *Lawyers' Co-op. Pub. Co.*, 64 Fed., 360;
Harper v. *Ranous*, 67 Fed., 904;

Daly v. *Webster,* 56 Fed., 483, 488, C. C. A.;
Ogilvie v. *Merriam Co.,* 149 Fed., 858, 862;
Doan v. *Am. Book Co.,* C. C. A., 105 Fed., 772, foot of 776.

The differences between the copyright act and the patent law are, however, found solely in what in patent law is the field of use. In the field of making and the field of sale the statutory provisions are the same, and hence the right of vending is the same under both statutes.

The owner of the copyright may make a valid contract with his publishers as to the selling price of copies of the copyrighted article.

Drone on Copyright, 365;
Murphy v. *Christian Press Assn.,* 38 App. Div., 426, 430.

It was said by Judge Clifford in *Parton* v. *Prang* (3 Cliff., 537):

> "Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description. * * * Sales may be absolute or conditional, and they may be with or without qualifications, limitations and restrictions, and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property."

And see

Hudson v. *Patten,* 1 Root (Conn.), 133;

> *Aronson* v. *Baker*, 43 N. J. Eq., 365, 369;
> *Park* v. *Nat. Wholesale Druggists' Assn.*, 175 N. Y., 1, 19.

This case, with *Straus* v. *American Publishers' Association*, 177 N. Y., 473, are discussed in *John D. Park & Sons* v. *Hartman*, 153 Fed., 24, 35, 36.

Judge (now Mr. Justice) Lurton, speaking for the Circuit Court of Appeals, said:

> "There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute, and the rights secured to an inventor under the patent statutes, that the cases which relate to the one statute are not altogether controlling as to the other" (see *Bobbs-Merrill Co.* v. *Straus* (C. C. A.), 147 Fed., 15, 23).
>
> "*Nevertheless the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply.*" (*Citing Murphy* v. *Christian Press Assn.*, supra.)

The headnote is in part as follows:

> "The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal anti-trust act of July 2, 1890 (26 Stat., 209, c. 647), *which has been extended to contracts affecting the sale and re-sale, the use or the price of articles made under a patent, or productions covered by a copyright,* does not extend also to

> articles made under a secret process or medicine compounded under a private formula" (153 Fed., 24).

The words which we have italicized are exactly in point in the case at bar. If the law was so stated, notwithstanding the decision of the Circuit Court of Appeals in the *Bobbs-Merrill* case, the statement more plainly is the law, in view of the decision of this Court in that case, holding that copyright is a sole right to vend, as well as a right to multiply copies.

That an owner of copyright is not, on the sale of a copyrighted article, necessarily divested of all his statutory rights in regard to it, but only of such rights as he conveys, appears from

> *Cooper* v. *Stephens* (1895), 1 Ch., 567;
> *Marshall & Co., Ltd.*, v. *Bull., Ltd.*, 85 Law Times Rep. 77, 82;
> *Patterson* v. *Ogilvie*, 119 Fed., 453;
> *Stevens* v. *Gladding*, 17 How., 447.

In the case at bar in the New York Court of Appeals on the second appeal Judge Willard Bartlett delivered a dissenting opinion, in which two judges concurred. They voted, on the authority of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S., 339, to reverse the decision of the Court of Appeals theretofore made.

Judge Bartlett said:

> "The fair import of the decision is that the owner of a copyright obtains nothing as such under the Federal law but the exclusive right to publish and multiply copies of the protected work and vend the same. When he

> sells copies, the contracts of sale are unaffected by the copyright statutes, but are subject to the same rules of law as those which apply to contracts for the sale of other personal property."
>
> *Record*, p. 188.

We respectfully submit that the learned judge misapprehended the effect of the decision which he cited. In the *Bobbs-Merrill* case this Court carefully limited the decision to the facts, saying:

> "In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, *and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice in the book undertaking to restrict the retail sales to a price of one dollar a copy.*
>
> The precise question therefore in this case is, does the sole right to vend (named in §4952) secure to the owner of the copyright, the right after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, *because of a notice in the book that a sale at a different price will be treated as an infringement*, which notice has been brought home to one undertaking to sell for less than the named sum. We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. *There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sale of the book*" (p. 350).

The Court also said (at page 345):

> "We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. * * *
>
> The learned counsel for the appellant in this case in the argument at bar *disclaims relief because of any contract,* and relies solely upon the copyright statutes and rights therein conferred. The copyright statutes ought to be reasonably construed with a view to effecting the purpose intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor to be narrowly construed as to deprive those entitled to the benefit of the rights Congress intended to grant." (Italics ours.)

It appears on the face of the opinion

1. That the question of the validity of a contract between the copyright owner and the vendee of the copyrighted article was not passed upon.

2. That the authority of patent decisions in copyright cases where the circumstances are similar and the applicable statutory provisions are equivalent was not questioned.

3. That the authority of *Bement* v. *National Harrow Co.,* 186 U. S., 70, was not shaken. Of this case Mr. Justice Day, speaking for the Court, says:

> "In *Bement* v. *National Harrow Co.,* 186 U. S., 70, the suit was between the owners of the letters patent as licensor and licensees seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee.
>
> The case did not involve facts such as in the case now before us, and concerned a contract of license sued upon in the state court, and, of course, does not dispose of the question before us" (210 U. S., 345).

The case at bar is distinguishable from the *Bobbs-Merrill Case* on precisely the same grounds as the *Bement Case,* and the language of Mr. Justice Day, in regard to the distinction, may be paraphrased as follows:

In the case at bar the question is as to the validity of a contract between the owner of a copyright and his vendee or licensee as to the price and terms on which the copyrighted article might be dealt with by the vendee. The case does not involve facts such as in the *Bobbs-Merrill Case* and concerns a contract of sale or license brought in question in the state court, and, of course, is not disposed of by the decision in the *Bobbs-Merrill Case.*

Bement v. *National Harrow Co.* and *Henry* v. *Dick Co.* show that when a patentee sells subject to conditions a patented article, the contracts of sale are affected by the patent statutes and are not affected by anti-monopoly laws as are contracts for the sale of other personal property. *Bobbs-Merrill Co.* v. *Straus* does not hold or imply that this rule does not extend to contracts of sale made by a copyright owner with his vendee.

These views are sustained by *Dr. Miles Medical Co.* v. *Park Sons & Co.,* 220 U. S., 373, 405, and by the discussion of the *Bobbs-Merrill Case* in *Henry* v. *Dick Co.,* 224 U. S., 1, 43-47.

That was a case relating to the use of a patented article. Mr. Justice Lurton pointed out the exact scope of the *Bobbs-Merrill Case* and the difference between the copyright and patent statutes in regard to the field of use and said:

> "There is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a construction of the applicable statute and the special facts of the cases" (p. 47).

There is resemblance between the "exclusive right to * * * vend" a patented article and the "sole liberty * * * of vending" a copyrighted article. No difference between a patented article and a copyrighted article is pointed out in the *Bobbs-Merrill Case* or has been suggested in this case which tends to prevent the principle of the *Bement Case* and the *Dick Case* from being applied to the case at bar.

Judge Willard Bartlett in his dissenting opinion (*Record,* pp. 187, 193 N. Y., 496, 499) says:

> "On the other hand, Mr. Justice Day, writing for the Supreme Court of the United States in the Bobbs-Merrill case, expressly declares that there are differences between the patent and copyright statutes in the extent of the protection granted by them, and cites with approval an opinion by Circuit Court Judge Lurton, in which he said that these differences are so wide 'that the cases

> which relate to the one subject are not controlling as to the other'" (210 U. S., on p. 246).

What Mr. Justice Day cited from the opinion of Circuit Judge Lurton was:

> "that the cases which relate to the one subject are not altogether controlling as to the other."

The omission of the word "altogether" essentially changes the meaning of the passage. If decisions in patent cases are not controlling in copyright law it might well be argued that the Court of Appeals erred in following the *Bement Case.*

Judge Bartlett quotes from *Murphy* v. *Christian Press Ass. Pub. Co.,* 38 App. Div., 430, as follows:

> "We suppose that the author of a new geometry may fix the price at which he will sell his work at any time, or arrange with others for its publication and sale at the stipulated price. But if all the publishers of books on geometry were to combine and agree not to sell any publication on that subject, except for a stipulated price, the contract would be in restraint of trade, and void."

The members of the American Publishers' Association did not agree not to sell books on geometry or books on any subject except for a stipulated price. Neither the Association nor any member of it had anything to do with fixing the price of any book except that each member fixed the price

of his own books. Competition between publishers was in no way affected by the existence of the Association. Each publisher agreed that he would fixe a price upon his own book and arrange with others for its publication and sale at the stipulated price. That is, he agreed that he would make as to each of his books a lawful agreement.

FOURTH POINT.

The agreement of the American Publishers' Association was not in violation of the Sherman Act.

It has been argued that each publisher had a right to put a retail net price upon each copyrighted book published by him; that he had a right to mark this net price upon the paper wrapper; and that he had also a right to sell his copyrighted books to those booksellers only who would maintain the retail price of such book for one year and to those booksellers and jobbers only who would sell their copyrighted books except at retail to no one who cuts such net prices.

We shall now argue that each publisher could agree with other publishers that he would conduct his own business according to this method which as an individual he could lawfully pursue.

It is to be noted that the question has not heretofore been considered by any judge or argued by counsel in this case. The question comes before this Court in first instance as well as in last resort.

It may be admitted that all publishers could not

lawfully agree to fix a price upon all their copyrighted books on geometry or on any other subject.

> *Murphy* v. *Christian Press Assn.*, 38 App. Div., 426.

It may also be admitted that the publishers could not enter into a combination for the purpose of restricting output and destroying competition, or refusing to sell their product to jobbers except at a price fixed not by trade and competitive conditions, but by the decision of a committee.

> *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S., 20.
> *C. C. A.*, 191 Fed., 172.

On the other hand we claim that all or any of the publishers might make rules for regulating the conduct of their business among themselves and with the public, and providing for just and fair dealings among them, provided the regulations were made for the legitimate purpose of reasonably forwarding personal interest and developing trade, without intent to wrong the general public or limit the right of individuals, or restrain the free flow of commerce, or bring about the evils, such as enhancement of prices, which are considered to be against public policy.

> *Anderson* v. *United States*, 171 U. S., 604.
> *Hopkins* v. *United States*, 171 U. S., 578.
> *Standard Oil Co.* v. *United States*, 221 U. S., 1, 58.
> *Straus* v. *American Publishers Association*, 177 N. Y., 473, 477, 488, 489, 490, 491.

Park & Sons Co. v. *Nat. Druggists Assn.*, 175 N. Y., 1.

That some regulation was necessary of the publishing trade as it existed before the formation of the American Publishers' Association appears from the complaint:

> "*Twelfth.*—That throughout the said period the publishers, who also sold and still sell at retail, and retail dealers were accustomed to advertise and offer the sale of books at retail at certain prices called 'list prices' and to deceive the public or those who were not acquainted with the wiles and customs of the trade, to induce them to believe that said 'list prices' were the ordinary retail prices of such books, whereas, in fact, both the publishers and the dealers only obtained such 'list prices' at retail from the ignorant and unwary, but gave large and liberal discounts from said prices at retail to anyone who inquired, or was familiar with the customs of the trade.
>
> "*Thirteenth.*—By reason of such deception and lack of uniformity in the price of the same book, the purchasing public lost confidence in the publishers who sold at retail, and in the dealers, and gave their custom to such dealers in books, amongst others, to these plaintiffs, as had established fixed prices, and where they were assured that the greed of the dealer would not attempt to secure an extortionate profit or charge different persons different prices for the same book.
>
> "*Fourteenth.*—That by reason of the foregoing facts the publishers of books who sold their own and other publishers' books at re-

> tail, and a large number of dealers found their business and their profits decreasing.''
>
> Complaint, pp. 16, 17.

It thus appears by the plaintiffs' own statement that by reason of ''lack of uniformity in the price of the same book'' and the fact that dealers could ''charge different persons different prices for the same book'' the business of publishers and dealers was diminishing and the public was deceived and lost confidence in the trade. It is true that this condition of things gave an advantage to the owners of department stores who wished to sell books at less than a living profit, as an advertisement for their other goods, but this advantage was at the expense of the trade.

> ''Retail booksellers throughout the country were injuriously affected by the competition of department stores and mail order houses.''
>
> Finding 92, p. 133.

It was, therefore, apparent in the year 1900, that, in the interest of the public and of all publishers, and of dealers and booksellers who sold books for profit, it would be advantageous to adopt a trade rule prohibiting ''lack of uniformity in the price of the same book'' and providing that dealers should not ''charge different persons different prices for the same book.''

Each publisher of copyrighted books could, by agreement with the bookseller to whom he sold, lawfully fix the retail price at which that bookseller should dispose of such copyrighted books. If all publishers should do this the abuses set forth in the complaint would be prevented.

This was the origin of the American Publishers' Association. Its members, for the benefit of the public, and of all publishers and booksellers, and for their own benefit, agreed that under the powers given to them under the copyright law they would each fix a retail price upon their copyrighted books for a period of one year after publication. Regulating trade is not restraining trade.

> *U. S.* v. *Reardon*, 191 F., 454, 458.
> *Fonotipia L't'd* v. *Bradley*, 171 F., 951, 959.
> *Heim* v. *N. Y. Exchange*, 64 Misc., 529, 531.
> *Am. Live Stock Com. Co.* v. *Chicago Live Stock Exchange*, 143 Ill., 210.

The rule complained of was an admirable specimen of legitimate trade regulation. It was devised to prevent a recognized evil which affected the whole trade and was injurious to the public. The rule did not go beyond the evil which it was planned to redress. It called upon no member to do any act which he could not lawfully perform and it had none of those incidents which sometimes make action by a combination unlawful, even when every member of the combination might individually take it.

According to the complaint ninety-five per cent. of the publishers and ninety per cent. of the booksellers in the United States approved the rule (pp. 11, 13). No one except Macy & Company is alleged to have opposed it. It does not appear that the public has in any way been injured by the existence of the American Publishers Association. A trade rule approved by all engaged in a trade is presumptively fair and reasonable.

The rules and the agreement in no way restrained the competition which had existed between the publishers. There was no limitation of output or fixing of prices by any common action. Each publisher continued to carry on his business in unrestricted competition with all others. There was no restraint of competition between jobbers, there was no attempt to obtain for the members of the Association any monopoly. Every publisher could become a member of the Association. Members of the Association were left free to deal under the rules with any publisher and with any jobber or bookseller. The general flow of commerce was not interrupted.

The desire of a vendor to vend the articles in which he deals on equal terms to all purchasers is not immoral. The establishment of a fixed price, —a price equal to all purchasers—is a forward step in the evolution of commerce and is imposed by legislation whenever possible.

Railroad companies are not allowed to fix their rates by agreement with each other, but they are by law compelled to charge the same rate for the same service without discount or rebate to anyone. The publishers voluntarily regulated the book trade to the same purpose (although to a far less extent) that the legislature has regulated the trade of common carriers. In each case the incidental restraint was to the advantage of the public.

The case at bar is distinguishable from *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, because the commodity there in question, unlike a copyrighted book, was "not entitled to special privilege or immunity" (p. 408). It was said (p. 402):

> [The complainants'] "case lies outside the policy of the patent law, and the extent of the right which that law secures is not here involved or determined."

But if we leave out of consideration the privilege and immunity given by the copyright law, there remain distinctions which would validate the agreement of the American Publishers' Association on the facts of this case, under the rules laid down in *Dr. Miles Medical Co.* v. *Park & Sons Co.* The Court, speaking by Mr. Justice Hughes, there said:

> " 'The true view at the present time,' said Lord Macnaghton in *Nordenfelt* v. *Maxim-Nordenfelt &c. Co.,* 1904 A. C., p. 565, 'I think is this: The public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.' * * *
>
> "But agreements or combinations between

> dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer."
>
> *Dr. Miles Med. Co.* v. *Park & Sons*, 220 U. S., 406, 407, 408.

The rule of the American Publishers Association was "reasonable in reference to the interests of the parties concerned," as is shown by the plaintiffs' allegation that ninety-five per cent. of all publishers, and ninety per cent. of all booksellers favor the rule. No publisher and no dealer except the plaintiff is shown to oppose it. The rule is "reasonable with reference to the interests of the public" because there is no proof of any increase of prices or other injury to the public and on the contrary the complainant alleges that the absence of fixed prices was used to deceive the public and that by reason "of such deception and lack of uniformity in the price of the same book, the purchasing public lost confidence and withdrew their patronage."

Record, pp. 16, 17.

The rule did not have for its "sole purpose the destruction of competition and the fixing of prices." The competition among publishers in output and price was wholly unrestrained. Each retail dealer would be restrained from competing as to the retail price of any particular copyrighted book, but he could sell any other copyrighted book at its price or any uncopyrighted

book at any price. The rule was directed not at the competition of ordinary dealers, but at the illegitimate competition of Macy & Co. The rule was "so framed and so guarded" as to forbid the "lack of uniformity in the price of the same book" which both parties admit to be injurious to the trade and to the public, and which, therefore, for the purposes of this case, the Court must hold to be injurious.

We submit, therefore, that even under the general principles of law applicable where there is no special privilege or immunity the rule of the American Publishers' Association, so far as the facts of this case are concerned, was valid and that the court would not be justified in overturning a trade regulation satisfactory to the whole book trade and beneficial to the public, because it tended to prevent Macy & Co. from selling books at a loss to aid in selling clothing and furniture at a profit.

The American Publishers' Association was an organization formed

> " to advance the interests of the book publishing business; to foster the trade and commerce of said business and the interests of those engaged therein and in its allied trades and professions; to reform abuses relative to said business; to secure freedom from unjust or unlawful exactions; to diffuse accurate and reliable information as to the standing of merchants and other matters; to procure uniformity and certainty in the custom and usages of the trade and commerce of book publishing; to settle differences between its members and between them and others carrying on business with its members, and to pro-

> mote a more enlarged and friendly intercourse in the trade and between business men generally; to provide and establish rules and regulations tending to promote the best interests of its members.'' (Record, p. 116.)

Its purposes, on a large scale, resembled those with which the Traders' Live Stock Exchange organized the trade of the Kansas City stock yards and which were examined in *Anderson* v. *United States,* 171 U. S., 604.

We submit that that case controls the case at bar. From an opinion which is all applicable we quote as follows:

> ''It will be remembered that the Association does no business itself. Those who are members thereof compete among themselves, and with others who are not members, for the purchase of the cattle, while the Association itself has nothing whatever to do with transportation—nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader may become a member of the Association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of trade is neither the necessary nor direct effect of its formation. * * * There is no feature of monopoly in the whole transaction. * * *
>
> ''In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce because, if it be conceded that they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that

trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

"It has already been stated in the *Hopkins Case,* above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace state commerce, and where the undisputed facts show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement are engaged, such agreement is not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and accidental, and not its purpose or object. * * *

"The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good," pp. 614, 615, 616.

And see

Standard Oil Co. v. *United States*, 221 U. S., 1, 58.

FIFTH POINT.

An answer to the brief for plaintiffs in error.

A.

The statement of the facts (pp. 11-23) is largely devoted to facts existing before April 1st, 1904. At that date the rules of the American Publishers' Association were changed in several respects to conform to the decision of the New York Court of Appeals on demurrer. The amended rules in no way affected dealings in uncopyrighted books and no subsequent acts of the defendants relating to uncopyrighted books appear in the record. The amended rules were set up in the answer. The trial court adjudged the agreement and acts prior to April, 1904, concerning uncopyrighted books unlawful and awarded an injunction and damages therefor. No appeal was taken from this part of the judgment (Record, pp. 174, 175, 5, 6). There was, therefore, in the Court of Appeals and there is now no question relating to uncopyrighted books. All allusions to uncopyrighted books are irrelevant except so far as they enable the Court to understand the history of the litigation.

B.

The statement of the Federal right set up in Point I (a) is not, we think, sustained by the record and we refer to our former brief, pp. 16, 17, 18.

It is said in Point I (*b*), on page 30, that the decision of the Circuit Court of Appeals

> "Must necessarily proceed on the ground that the decision and final judgment of the Court of Appeals and Supreme Court of the State of New York involved a determination that the combinations, conspiracies and conduct alleged against the defendants *did not constitute a violation of the federal anti-trust act.*"

This statement seems to be refuted by Judge Ward's opinion (p. 35):

> "The fact that the judgment in the State Court depended upon the State statutes and that the complaint in this case is founded on the Federal statute, which is not within the jurisdiction of the State Court, makes no difference. The plaintiffs having the option to go into either court chose the State Court, and their claim having been there adjudicated, cannot be presented the second time to any other court."

It is said at page 36:

> "The defendants in error claimed in that case that the State Court had no jurisdiction of an action to recover treble damages under Section 7 of the federal act, and that so far as the judgments and opinions of the State Courts affected any rights of these plaintiffs under the federal anti-trust act, such decisions are not binding as *authority* upon the federal courts."

This is strangely inaccurate. Not the defendants in error, but the plaintiffs in their reply

claimed that the state court had no jurisdiction under the Sherman Act (Brief of Plaintiffs in Error, p. 33). Our position was that Macy & Company were estopped from making this denial and that the denial was of no consequence if true. We never claimed that the judgments of the state courts were not binding as *authority* upon the Federal courts. The statement of the learned counsel in that regard may perhaps be due to a misapprehension of this sentence in our brief before the Circuit Court of Appeals:

> "We think that the Court of Appeals was right and that the error of Judge Bartlett's dissenting opinion has been made manifest by the case of *Henry* v. *A. B. Dick Company,* 224 U. S., 1. We do not argue the question, because the judgment of the state court is offered in this case not as an authority or precedent, but as a thing adjudged. As such its binding force in this court it is in no way dependent upon the correctness of the reasoning by which it was reached."

C.

In Point II (pp. 37-41) the learned counsel base their argument upon the agreements and acts prior to April, 1904, relating to uncopyrighted books. As has been pointed out, the portion of the judgment not appealed from disposed of these matters and the argument is therefore irrelevant.

It is also inaccurate at page 41 in saying that in 1904 no other change took place in the rules except the amendment that they should apply to copyrighted books only, and in saying that after the amendment the defendants' "methods were

continued in precisely the same way as theretofore."

In *Montague & Company* v. *Lowry*, 193 U. S., 38, the essential facts were wholly different. There has been no restriction of membership in either Publishers' or Booksellers' Association and no restriction of trade to members of either association. All publishers may deal freely with all dealers, each publisher imposing on each sale of copyrighted books, a condition which under the copyright law he may lawfully impose.

D.

In Point III there is quotation from *Bement* v. *National Harrow Co.* It is enough to say that if the publishers had by common action fixed the price of books published under copyrights owned by different publishers they might have made an agreement analogous to that escrow agreement upon which this Court in the *Bement Case* declined to express an opinion. If the publishers had agreed not to sell their copyrighted books except at a price fixed not by trade and competitive conditions, but by the decision of a committee and had established zones of sales they might have brought themselves within the rule stated by Mr. Justice McKenna in the *Standard Sanitary Case.*

But the fixing of prices was left wholly to the individual publishers, each fixing the price of his own copyrighted books. The agreement that all should fix such prices was a lawful trade regulation. There was no limitation as to the persons to whom sales were to be made. The agreement that each member should refrain from selling at wholesale to persons who dealt in copyrighted books in violation of the lawful conditions on

which they were sold by the members of the association was analogous to the rules of Exchanges, Boards of Trade, Labor Unions and other organizations of men engaged in the same occupation.

Arthur v. *Oakes,* 63 F. 310.

It is, we think, incorrect to say (p. 50) that the agreements controlled the supply, after 1894, of *all copyrighted* books whether published by the members of the Publishers' Association, or not. Rule III provided "that the members of the Association agree that copyrighted books shall be sold by them to those booksellers only" &c. &c. Plainly this refers to the copyrighted books which members of the Association are engaged in selling to booksellers. But each publisher sells to booksellers the books which he publishes. It does not appear that any publisher was also a jobber or ever sold to booksellers any book not published by himself. Furthermore it is plain that the supply to booksellers of the copyrighted books of publishers who did not belong to the Association would continue from them and through jobbers unrestrained and uncontrolled by the rules or the action of the Association.

SIXTH POINT.

If the writ of error be not dismissed the judgment should be affirmed.

All which is respectfully submitted.

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